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THE RULE OF LAW AND THE POLITICS OF FEAR:
REFLECTIONS ON NORTHERN IRELAND

by

RICHARD DEVLIN*

There has never been a document of culture which was not at the same time a document of barbarism.

Walter Benjamin

I. *Introduction*

In this essay, I employ the methodology of narrative jurisprudence¹ to develop briefly some critical reflections on the nature and function of law in Northern Ireland, and in so doing to give voice to what bell hooks has called a "subjugated knowledge".² In order to achieve this goal I will draw upon the interdisciplinary insights of neo-marxist, feminist and critical political and social theory, and psychoanalysis. In Part II, I will interpret my own experiences of law in Northern Ireland through the adumbration of neo-Marxist inspired theory of the nature and function of law in a western liberal democratic society. Particular attention will be paid to the legal dimensions of the Hunger Strike of 1981. Part III will explain that the juridical problems of Northern Ireland cannot be understood as solely a question of "terrorism" or the failure of the Rule of Law. The Rule of Law is an ideological ideal that obscures the way in which the politics of fear are imbricated in it. Consequently, there are irrational and un-

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1 For a bibliography of narrative jurisprudence, see D. Elkins, *Journal of Legal Education* 40 (1990), 203.

2 *Yearning: Race, Gender and Cultural Politics* (Toronto: Between the Lines, 1990), 8.

conscious factors, as well as rational, utilitarian and conscious considerations, that help to explain what happens in Northern Ireland.

Part IV finally argues that an element of the solution to the problem is the recognition that neurotic fear is a fundamental dynamic of the Rule of Law and that until law is disconnected from fear, the spiral will continue. I will suggest that to begin to seek out an alternative vantage point on law, we should look to feminism. From this perspective, I will suggest that if law was made more a cognate of the ethic of care rather than hierarchy, if mutual responsibility and a valorization of "otherness" could trump hubris, then some tentative steps might be taken to decentre the impulse to *Thanatos* that underlies the Northern Irish legal system.

II. *A Relational Theory of the State and an Interactional Theory of Law*

A. *The State*

Both Liberalism and traditional Marxism, despite their apparent differences, reify the state. Liberalism, working on the assumption of consensus, perceives the state as a subject, a neutral arbitrator and great leveller. Traditional Marxism, on the contrary, based on the assumption of conflict, portrays the state as an object, a malleable instrument of domination in the hands of the ruling class. Both approaches mischaracterize the state by portraying it as a "thing".

Following Gramsci and Poulantzas, it is explanatorily superior to comprehend the state as relational, that is, as the material condensation of the social relations of society.³ In particular, the state should be understood as a factor of social cohesion, as seeking to keep society together in spite of the fragmentation and plurality of interests. This is not however liberal pluralism, because applications of this theory show state power as the power of a definite class or group to whose interests the state corresponds. In the context of Northern Ireland, these interests have, historically, been those of the Protestant middle and upper classes.⁴ Simultaneously, we must be careful not to slip

3 See my "Law's Centaur", *Osgoode Hall Law Journal* 28 (1989), 219.

4 For an impressive and full discussion of this proposition see P. Bew, P. Gibson and H. Patterson, *The State in Northern Ireland 1921-1972* (Manchester: Manchester University Press, 1979).

into marxist instrumentalism, that is, the idea that the state is simply manipulated by the Protestant ruling class to the disadvantage of all Catholics.⁵ A distinction must be drawn between seeing the state as operating at the *behest* of the ruling Protestants (the instrumentalist analysis) and on their *behalf* (the relational analysis). Thus, the concessions granted to working class Protestants and Catholics do not undercut the supremacy of the Protestant ruling class. The education of Catholics is an important example. Education was never conceived of as a palliative for the Catholics, but it did provide a career and class structure that allowed upward mobility to certain sections of the Catholic community, thereby deradicalizing its leadership.

The state can achieve the cohesion that is its function either through the pursuit of hegemony or through the enforcement of coercion. As Femia⁶ points out, there are three possible "levels" of hegemony: integral, decadent and minimal. Integral hegemony is the paradigm situation, and is basically unachievable outside "organic societies." In decadent hegemony the elite is incapable of commanding unequivocal allegiance from the non-elite, and the potential for social disintegration and conflict is ever present. Minimal hegemony rests on the ideological unity of the economic, political and intellectual elites and the simultaneous fulfilment of a few of the interests of the subordinated groups. The state staggers on by the co-option of the leaders of the subordinate classes.

Minimal hegemony, describes the Northern Irish situation. Various carrots are offered by the Protestant elite to the Protestant working class, like job preference in "the security forces",⁷ and to the politi-

5 See for example, E. Strauss, *Irish Nationalism and British Democracy* (Westport, Conn: Greenwood Press, 1951).

6 J. Femia, *Gramsci's Political Thought* (Oxford: Clarendon, 1981), 46-49.

7 R. Rowthorn, "Unemployment: The Widening Sectarian Gap", *Fortnight* 16 December-26th January 1986. This, of course, is simply the fulfilment of well established Protestant elite demands. Consider, for example, Brian Faulkner's (Stormont M.P. and subsequent Prime Minister of Northern Ireland) pronouncement in 1954 that:

There is no reason why Orangemen individually and collectively should not interest themselves in the economic welfare of the community. I mean by that statement we should be anxious to find employment for our brethren.

Quoted in Sunday Times Insight Team, *Ulster* (London: Penguin, 1972), 30. For a full discussion of the systematic nature of the discrimination in

cal and intellectual elites of the Catholics — social status and relative financial comfort. However, minimal hegemony contains the seeds of its own destruction, because it confers some power on the subordinate class which will eventually be used to further destabilize the power of the ruling classes. Support of the working class Protestants for the Democratic Unionist Party and the demand for civil rights and measures against discrimination by educated Catholics and some liberal Protestants⁸ in the late 1960's are such examples. But when integral hegemony is unattainable because of the magnitude of the contradictions, cohesion might still be maintained through the second path: coercion.

It is interesting to note that some neo-Marxist⁹ and critical legal scholars,¹⁰ reacting to Marxist instrumentalism, have tended to focus their analyses on the hegemonic and ideological aspects of the modern state, thereby underemphasising its coercive element. We should bear in mind, however, that Gramsci, who wrote his notebooks while in prison, understood hegemony and coercion as being in a dialectical relationship in that, political relations

have two fundamental levels, corresponding to the dual nature of Machiavelli's centaur - half animal, half human. These are the levels of force and consent, authority and hegemony, violence and civilisation.¹¹

If integral hegemony is unattainable and consequently only decadent and minimal hegemony are left and they, in turn, are inherently incapable of achieving the coercion required, then we are left with a clearer understanding of the relationship between coercion and the liberal democratic state. Coercion and hegemony function simultaneously to cement liberal democratic societies together. The modern state is not an 'exceptional' fascist state; nor is it 'normal', that is, a

Northern Ireland see R. Rowthorn and N. Wayne, *Northern Ireland: The Political Economy of Conflict* (Cambridge: Polity Press, 1988).

8 K.A. Kovalcheck, "Catholic Grievances in Northern Ireland: Approaches and Judgement", *British Journal of Sociology* 38 (1987), 77 at 80.

9 For example, N. Poulantzas, *Political Power and Social Classes* (London: New left Books, 1977); and L. Althusser, *For Marx* (London: Verso, 1969).

10 See generally, M. Kelman, *A Guide to Critical Legal Studies* (Cambridge Mass.: Harvard University Press, 1988).

11 Gramsci, *Selections from the Prison Notebooks* (New York: International Publishers, 1977), 169-170.

supposedly non-coercive state.¹² It is an authoritarian state in which coercion complements hegemony in a dialectical unity. As the political anthropologist Allen Feldman points out:

Since its inception in 1921, the Northern Ireland state never functioned as a passive instrument of class or sectarian interest. Rather it engaged in autonomous programs of internal hegemonization that generated a receptive configuration of Protestant class fractions. The state sought legitimation in the democratization of violence, which strengthened its affective association with populist anti-Catholic actions and postures. The democratized command of violence was instituted through the B Specials, a paramilitary unit with strong regionalist ties to Protestant communities. The state used the paramilitary organisation and the RUC to rationalize populist sentiment. This regimented and regimental populism enabled the state to actively collaborate in the formation of Protestant ethnicity...

The state's militarist articulation with local Loyalist culture blurred any distinction between repressive and ideological apparatuses. This conflation rendered the social rhetoric of violence and the paramilitary regimentation of the masses internal mechanisms for aligning Protestant class fractions.¹³

Law, I will now argue, is the apotheosis of this dialectical unity.

B. *The Law*

I have emphasized the importance of the political analysis of the state for two reasons. First, an examination of the nature of the state is vital for the understanding of the Rule of Law, which is over-determined by politics. Secondly, the fairly abstract discussion of the state is homologous with the more contextual theory of law developed below.

We should approach law in the same way as we approached the state: that is, we must reject the reification inherent in both liberal¹⁴

12 These are terms developed by Nicos Poulantzas in his analysis of state forms in *Fascism and Dictatorship* (London: New Left Books, 1976); *Crisis of the Dictatorships* (London: New Left Books, 1976); *State, Power and Socialism* (London: New Left Books, 1979).

13 Allen Feldman, *Formations of Violence* (Chicago: University of Chicago Press, 1991), 40.

14 For a fairly classic statement of the liberal viewpoint see D.S. Greer, "The Impact of the Troubles on the Law and Legal System of Northern Ireland", in A.J. Ward, ed., *Northern Ireland: Living with the Crisis* (Green-

and traditional Marxist analyses. Law is neither a thing nor is it monolithic; it is part of the complex matrix of society. It too is a material condensation of social relations. Moreover, law is not simply a passive or reactive component of the social whole. It is a proactive, or formative, component of that matrix. Law is constitutive of, as much as it is reactive to, social relations. This might be called an interactional theory of law. A useful example of the reactive and constitutive nature of law can be found in the operations of the Constitution of Northern Ireland.

The Constitution and the statelet came about as a result of the retreating colonialism of the British Empire, and the pursuit of self-determination by the Irish people. However, not all those who lived in Ireland sought self-determination, and some wished to retain the link with Britain. The Constitution was a reaction to these political realities, and an artificial statelet was created as a compromise. However, once created, the Constitution had a dramatic impact on the identity of those whose interests it was said to represent. Protestants frequently identified themselves as "Ulstermen" [sic]¹⁵, sometimes in preference to Britain. Thus, when British policies in Northern Ireland, such as Sunningdale and the Anglo-Irish Accord, do not correspond with the self-perceived interests of the Protestant majority, many of them have indicated that they would forego their relationship with Britain in order to maintain the identity of Protestant Ulster. The Northern Irish Constitution condensed existing political relations but also constituted the identity of the Protestant people showing that Constitutions have profound ideological significance. Thus, the interactional theory of law encourages us to recognize that we make our own history, and to recognize that law is both a consequence and constitutive of social relations.

This is not, however, a pluralist analysis which portrays law as a neutral arena which absorbs and balances all relative viewpoints. The relationships involved are much more internal and the people interacting occupy different social positions: some rich, some poor; some religious, some non-religious; some British, some Irish. These people express their interpretations, their desires, their fears and their visions

wood: Praeger, 1987), 46 at 69.

15 For a further discussion of cultural identities in Northern Ireland see R. Rose, *Governing Without Consensus* (Boston: Beacon Press, 1971), 485.

through the law. Law itself must therefore be studied in terms of classes and class factions, political parties and political cliques, bureaucrats, cultural and religious movements and all their corresponding ideologies.¹⁶ Law is created by the interaction of all these social forces and, in turn, helps create the way in which these social forces interact. Law "both constitutes and is constituted".¹⁷

The values inherent in law therefore cannot be viewed as transcendental, rising above factional partisanship. On the contrary, law becomes another aspect of social relations where partisanship expresses itself; law is not distinct from politics but integral to politics. Thus, apart from de-reifying law and emphasizing its irrepressibly contextual nature, the interactional theory has the therapeutic consequence of enabling us to see that law is a human construct and therefore contingent, indeterminate, relative and subjective.

However, the interactional theory of law, underpinned as it is by the relational theory of the state, while recognizing the theoretical possibility that law has no natural essence, it does not slip into an uncritical belief in openness. An interactional theory, conscious of the dynamics of power and privilege, recognizes that law too, as a sub-component of the state, is driven by the "imperative of cohesion", the structural preservation of the *status quo*. It gravitates toward the protection and advancement of the interests of those who dominate in a society; it subordinates those who refuse to comply. As Mike Tomlinson says of pre-1969 Northern Ireland, "(a)s institutionalized forms, the police and the legal system constituted the most powerful expression of Unionist authority."¹⁸

This, however, is not simply a revamped version of instrumentalist Marxism; it is not law as a malleable tool in the hands of the ruling class. The relationship of law and politics is best understood as "relatively autonomous". The political does not determine the legal. Each of the fields develops out of the interaction, conflict and mutual adaptation of a variety of classes, social groups and subgroups on a

16 Aspects of such an analysis can be discovered in the work of Bew et al, see *supra* n.4, and *British State and the Ulster Crisis* (London: Verso, 1985).

17 Alan Hunt, "The Theory of Critical Legal Studies", *Oxford Journal of Legal Studies* 5 (1985), 37, 38.

18 M. Tomlinson, "Reforming Repression", in L. O'Dowd, B. Rolston and M. Tomlinson, eds., *Northern Ireland: Between Civil Rights and Civil War* (London: Pluto, 1980), 178 at 179.

variety of issues. Thus, the state *may* reflect the overall interests of one class or group, while law and legal relations *may* reflect the overall interests of a different class or group. Law and state are two separate, though interconnected, regions where social conflict manifests itself. They do not need to be exactly the same; the "legal" can be autonomous from the "political".

Legal autonomy derives from several sources. In part, it is a manifestation of the nature of the legal profession itself which claims to hold itself above political, economic or social calculation. Consider, for example, the partial resistance within the legal community to judicialization of the system of internment.¹⁹ Secondly, the profession attempts to resolve problems within the constraints of its own discursive practices such as consistency, ratio, precedent, the rule of law, etc. and this, on occasion, leads to a departure from the position advocated by the politically dominant. Stephen Greer, for example, highlights the *volte face* by the judiciary in relation to supergrass trials:

The initial success [of the supergrass system] was underwritten by an uncritical judiciary which subsequently realized its mistake and about turned, destroying the phenomenon it had helped create. This was achieved against the wishes of the executive authorities and, apparently, largely in response to a broadly based anti-supergrass campaign: contrary to the official view, therefore, Northern Ireland judges were acting together in a deeply political manner all along, but not in the crude sense alleged by conspiracy theory . . . [the choice was] between uncritical loyalty to counter insurgency policy as conceived by the executive and loyalty to the Rule of Law. Opting for the latter was ultimately deemed to be necessary in order to limit the damage to the legal system and to reassert a much compromised judicial 'independence'.²⁰

Third, this autonomy also derives, in part, from the fact that lawyers have their own professional material interests at stake.

The rewards for those employed in the administration of justice in Northern Ireland are considerable. A judge's annual income is now in excess of £50,000 and some of the top criminal lawyers in the Diplock courts are believed to earn as much as £100,000 a year. The take-home pay of police and prison warders is also high, averaging around £15,000 per year. These high earnings and the predominantly Protestant compo-

19 T. Hadden, K. Boyle, C. Campbell, "Emergency Law in Northern Ireland: The Context", in A. Jennings, ed., *Justice Under Fire: The Abuse of Civil Liberties in Northern Ireland* (London: Pluto, 1990), 1, 8.

20 "The Supergrass System", in Jennings, *supra* n.19, at 73, 93-94.

sition of the legal profession contrast sharply with the characteristics of most of the defendants. The majority are working class Catholics, often unemployed and dependent on state benefits.²¹

However, as the example of the Diplock court system indicates, the judiciary ultimately complies with the broader political necessity for the "reorganization of the judicial system into a counter-insurgency apparatus".²² Legal autonomy is only relative. Legal personnel incorporate their own "political tilts" into their legal roles. In this way, legal relations are influenced by the competing political aspirations of various social groups. However, it is not surprising to find that, generally, political and legal aspects are in harmony, indeed, perhaps in "teeth gritting" harmony. The explanation is not difficult to find: often the people with the greatest influence in both these arenas are from similar backgrounds and share a common ideology. Particularly poignant is Paddy Hillyard's analysis of the political connections of the Northern Ireland judiciary:

One of the major complaints of the civil rights movement was the partisan character of the Northern Ireland judiciary and the police. Of the 20 High Court judges appointed since the independent Northern Ireland courts were established, 15 had been openly associated with the Unionist Party; of the 23 County Court appointments, 14 had been visibly connected with Unionism. By the late 1960's, all the more important echelons of the judiciary and magistracy had strong Unionist associations. In the Northern Ireland Court of Appeal, two out of the three judges were ex-Attorney Generals in Unionist governments. In the High Court, one of the four judges was another ex-Attorney General and one was the son of an Attorney General. Among the twelve Resident Magistrates there was an ex-Unionist MP, an ex-Unionist Senator, a defeated Unionist candidate and a former legal adviser to the Ministry of Home Affairs...

Since 1969 a few Catholics have been appointed to the judiciary and the magistracy. Four of the ten judges in the High Court are now Catholic, although only one out of twelve is Catholic in the County Courts. Both professions therefore remain firmly rooted in Unionism. . .²³

21 P. Hillyard, "The Political and Social Dimensions of Emergency Law in Northern Ireland", in Jennings, *supra* n.19, at 191, 202.

22 Allen Feldman, *supra* n.13, at 87. See also B. Dickson, "The Legal Response to the Troubles in Northern Ireland", in P.J. Roche and B. Barton, eds., *The Northern Ireland Question: Myth and Reality* (Aldershot: Avesbury, 1991), 151 at 159.

23 *Supra* n.21, at 200. Such statistics may help to shed light on the concern identified by Professor D. Greer *supra* n.14, at 51 that "(t)he failure of

In Northern Ireland the connections between the juridical and political systems are very close. Let me now turn to the various ways in which the law fulfils its cohesive functions. I will argue that the law fulfils ideological, facilitative and violent functions. I will then proceed to posit the relationship between these functions.

1. *The Ideological Role of Law*

Law, in its ideological role, contributes to the state's attempt to achieve hegemony. Law attempts to affect people's lives in such a way that they consent to the current state of affairs.²⁴ Law fulfils what may be called a "directive" function in that its purpose is to achieve an acceptable level of consensus, to create relative stability in order that existing social relations might continue. The ideological function of law is to generate "spontaneous consent" and "the will to conform",²⁵ those two attitudes which indicate that some class or group has attained hegemony. Gramsci explicitly recognized this role in one of his few passing references to law:

This problem contains in a nutshell the entire "juridical" problem, that is, the problem of assimilating the entire grouping onto its most advanced fraction; it is the problem of education of the masses, and their "adaption" in accordance with the goal to be achieved. This is precisely the function of the law and state and in society...²⁶

Modern law plays a norm creating role which justifies modern social relations. It fulfils this role by the dual movement of "mystification" and "legitimation".

a. *Mystification*

Ideologies are material practices in that, not only are they created,

Roman Catholics to seek legal remedies in the courts for alleged discrimination ... in housing or employment has been regarded by some [identities unspecified] as the most puzzling feature of the Northern Ireland law and legal system prior to 1969."

24 Elsewhere, *supra* n.3, I have indicated that the concept of ideology as false consciousness should be rejected in favour of ideology as lived relations.

25 Gramsci, *supra* n.11, at 195.

26 *Ibid.*

but they also create social relations. A useful example is the Prevention of Terrorism Act in Great Britain which the government uses to generate anti-Irish hysteria in England, and to normalize an interventionist state that allows 45,000 people each year to be stopped, examined, searched and questioned,²⁷ all in the name of keeping out the "terrorists". Many people accept this as legitimate, even though it is part of the larger pattern of increased repression in England. Another example has been the attempt to construct as criminal, the activities of those who resist British rule. In this way, the question of national identity is reinterpreted as a problem of law and order. A central component of this depoliticizing process was the judicialization of internment. These are not simply abstract ideas; for the law cultivates a framework of suppositions upon which people build their relationships and activities, achieving what Poulantzas describes as a "remarkable socialization". Indeed, it was not until the Hunger Strikes of 1981 that the majority of the nationalist population fully realized the ideological significance of Gardiner's criminalization project. Moxon-Browne's study reveals that prior to the hunger strike, sixty-six percent of Catholics (and ninety two percent of Protestants) concurred with the statement that "the IRA are basically a bunch of criminals and murderers."²⁸

b. Legitimation

Legitimation provides the second aspect of legal ideology's dual movement. Poulantzas describes this as a "unifying effect" in which the state is presented as sovereign. A classic example is the Northern Ireland statelet itself, a politico-ideological artifact, which brought together the diverse interests of different classes of Protestants. It is juridical ideology which effects this dual movement; the juridical representation of the state as a source of unity in the midst of alienation, an alienation for which it is itself responsible. Moreover, law's own role in such a society is reinforced because,

the state's unity is found ... in the modern juridical system: the specific

- 27 C. Scorer et al, *The New Prevention of Terrorism Act* (London: The Cobden Trust, 1985), 36.
- 28 E. Moxon Browne, "The Water and the Fish: Public Opinion and the Provisional IRA in Northern Ireland", in P. Wilkinson, ed., *British Perspectives on Terrorism* (London: Hutchinson, 1981), 41.

normative ensemble made up of legal subjects modelled according to the image of the citizen, presents a systematic unity of the highest degree, in that it regulates the unity of these subjects by means of laws.²⁹

Law aspires to be the medium of cohesion amongst antagonistic social relations, an example from the Northern Irish context being the "anti-discrimination strategies" of the late 1960's and 1970's³⁰, but this is an antagonism for which it is at least partially responsible. Law is eulogized as the great civilizing force in society, the great protector:

over the past ten years much has been done to ensure that human rights in NI should be as well protected as elsewhere in the UK — indeed there are those who have said that there are more measures to maintain fair treatment and give legal protection to human rights in NI than in most other parts of Europe.³¹

Law is counterpoised to barbarism, violence and terrorism. Thus the world is turned upside down. Law is presented as the creator of society, when the reverse is more accurate; it is people who create law to regulate, or more accurately enforce, their own vision of social relations. Indeed, the dominance of juridico-political ideology is so pervasive that even during periods of crisis, oppressed groups often challenge authority within the parameters permitted by law. Civil disobedients appeal to concepts such as justice, rights, the Rule of Law and operate within the confines of legitimacy outlined by those who effectively dominate social relations. In doing so, they may gain some victories, even real victories, but the rules are tilted in such a way that they can never threaten the essentials of contemporary social relations. If the rules do provide a threat, then they will be changed. In short, such is law's capacity to act as social cement and control social discourse, that most people live their revolt within the bounds of juridico-political ideology.

Interestingly, the concept of civil disobedience has been undernurtured by the state in Northern Ireland and the law has been unable to adequately "breed values" so as to render the nationalist community malleable. This failure is due, in part, to the historical over-reliance on discriminatory municipal laws and emergency powers.

29 Poulantzas, *supra* n.9, at 278.

30 See, for example, Dickson, *supra* n.22, at 152-157.

31 *Protecting Human Rights in Northern Ireland* (1979), a British government publication, as quoted by Tomlinson, *supra* n.18, at 194.

The EPA is custom built for the oppression of a people. It's the model legislation for any country that wants to oppress people. The whole conveyor belt system is corrupt. The whole legal system here is geared to politics, not justice. They should stop using the law as a counterinsurgency tool. The EPA isn't a justice system — there's no justice for Catholics here. Here, the law is a tool to keep Catholics under control and in their place ...³²

Thus, the violent aspects of law are intertwined with ideology and legitimacy. Indeed this ideological trope becomes particularly persuasive, when it appears that so many of the "criminals" actually "confess" to their crimes.³³ Downplayed are the torturous, inhuman and degrading circumstances in which such confessions are obtained.³⁴

To conclude, it is clear that law as ideology is a crucial method by which the hegemonic condition is sought. However, it is important to avoid over-emphasizing the role of ideology; it is only one of several functions which modern law fulfils. Ideology is mediated by the other (facilitative and violent) functions of law and the law must always, first and foremost, be oriented toward the maintenance of social order.

2. *The Facilitative Role of Law*

A second manner in which law contributes to the continuation of capitalist social relations can be characterized as facilitative and relates more directly to the economic side of human interactions. In brief, the facilitative role of law, like the ideological role, is oriented towards the attainment of a hegemonic condition. It can be characterized as "[a] set of rules which organizes capitalist exchange and provides a real framework of cohesion in which commercial encounters can take place."³⁵ Law in this sense fulfils the role which Gramsci de-

32 J. Sluka, *Hearts and Minds, Fish and Water: Support for the IRA and The INLA in a Northern Irish Ghetto* (London: Jai Press, 1989), 206.

33 Occasionally, this results in double-doublespeak, as for example when using the concept of "converted terrorist", immunity or a reduction of sentence is granted.

34 See generally D. Walsh, *The Use and Abuse of Emergency Legislation in Northern Ireland* (London: The Cobden Trust, 1983).

35 Poulantzas, *supra* n.9, at 53.

scribes as that of an "organizer", it keeps things moving. Its relevance to this paper may be exemplified in the law of contract — with its ideological assumption of freedom to contract — that allows for discriminatory hiring practices³⁶ and underpins a resistance to anti-discrimination legislation. An historical example is the fact that limited companies in Northern Ireland — which were predominantly owned by Unionists — "were entitled to nominate up to six extra voters."³⁷

3. *The Violent Role of Law*

Frequently, this function of law is encoded as the "repressive" or "coercive" aspect of law. However, in order to confront the conventional wisdom that law and violence are antithetical, I want to make the strong claim that violence is an imperative of legal activity within contemporary society. We must acknowledge, first, that violence can be used both by those who defend existing social relations, and those who challenge them. Second, it is important to make clear that when legal personnel use violence, often it is not merely individual excess³⁸, the "frenzied attack"³⁹ carried out in the heat of the moment. Violence is endemic to the legal relations of modern society.

Existing society seeks to preserve itself in its established, known form; those groups who benefit from a particular configuration of social relations strive to preserve that situation. The State, as a material condensation of social relations, also functions to preserve the *status quo*. But the contradictions are too great, and since modern society is in continual flux, forces desiring social change continually emerge. When radical demands become threatening to the *status quo*, "accommodation" is replaced by coercion. Law is a vital part of these social

- 36 The Fair Employment Agency, "Report of an Investigation into Queen's University at Belfast" Table 4, at 11.
- 37 Sunday Times Insight Team, *supra* n.7, at 35.
- 38 The Cameron Report on *Disturbances in Northern Ireland* (1969 Cmd. 532) describes and trivializes the activities of the "security forces" as follows: "a number of policeman were guilty of misconduct which involved assault and battery, malicious damage to property ... and the use of provocative sectarian political slogans", at 73.
- 39 Home office pathologist, Alan Watson, describing the apparent mode of execution of Sean Savage in Gibraltar on 6th September 1988. Cited in Jennings, *supra* n.19, at xvi.

relations. There may be a widespread respect for the Rule of Law, but at the same time there is often dissent which manifests itself as a challenge to social stability. Though not necessarily oriented towards a revolutionary change in social relations, dissent does pose a threat to the social order. Law plays a crucial role in terminating this threat. As Colin Sumner reminds us, "[t]he legal system is first and foremost a means of exercising political control."⁴⁰ Moreover, this "imperative for the preservation of stability", as it might be called, is not a novel role which "authoritarian statist law" has taken on as, Poulantzas for example, might suggest. It is an endemic feature of modern law.⁴¹ Should there be any doubt as to the falsity of the counter-positing of law and violence, and the existential reality of the pervasiveness of legal violence in society, one needs only to consider the extensiveness of the armoury of legal violence: executive, legislative, judicial, police, military and penal. They could fill volumes.⁴² The ideological trope that is worked here is that it is called law. As Benjamin, with characteristic conciseness, avers, "Law making is power-making, and to that extent, an immediate manifestation of violence."⁴³

4. *The Genius of Law*

Law is driven by the couplet of "consent and coercion" or "kicks and kindness". But this does not imply that the greater the violence, the less the consent. The zero-sum approach, in which as one increases, the other necessarily decreases fails to capture the genius of law. Law's genius lies in its ability to make two acts, which are essentially the same, ideologically different. Law makes legal violence legitimate, and illegal violence illegitimate. Legal violence becomes acceptable in the popular psyche, even when used against those whose dissent is peaceful. Because there must be dissent within liberal democratic society there must always be a need for social control. Ideology is inherently incapable of transcending the factors of dis-

40 *Reading Ideologies* (New York: Academic Press, 1977), 277.

41 "Law's Centaur", *supra* n.3, at 272-281.

42 Two recent discussions of the Irish question would indicate this. See Jennings, *supra* n.19, and G. Hogan and C. Walker, *Political Violence and the Law in Ireland* (Manchester: Manchester University Press, 1989).

43 W. Benjamin, "Critique of Violence", in *Reflections* (New York: Harcourt, Brace, Jovanovitch, 1978), 277 at 295.

quilibrium; instability will surface, and "when in doubt" those who have been threatened by social instability will "lash out".⁴⁴ Law has a very human face with very human instincts. Law is people in action, but more importantly, it is legal people in action. In this way their actions appear to be legitimate. The genius of law stems from its capacity for legal and legitimate violence. Legal violence and legal ideology co-exist in a permanent mutually reinforcing unity. Law is a constitutionalization of violence.

Violence is continually present in the law, whether it is used frequently or infrequently. Violence in the law is not just oriented towards potential rebels or malcontents; it is directed towards all of us. Legal violence stalks in the guise of criminal law, the law against "normal crime". Once we recognize this metamorphosis, the integral relationship between violence and ideology becomes manifest. Because of the power of the threat of legal violence one is continually made conscious, through the police on the beat, through the media, through the courts, and finally through personal experience, of the effectiveness of legal violence. The act and threat⁴⁵ of violence has a double effect: first, it removes, either temporarily (for example, through internment by remand⁴⁶) or permanently (for example, by means of a shoot to kill policy⁴⁷), certain individuals; second, and more importantly, it modifies the conduct of other people. In brief, law, through legal violence, effectively used and even more effectively publicized, terrorizes us into acquiescence.

44 This was very much the response of the Stormont government in the first couple of years of the current phase of nationalist discontent when it added the Firearms Act (N.I.) 1969, The Protection of the Person and Property Act (NI) 1969, The Criminal Justice Temporary Provisions Act (N.I.) 1970, The Firearms Amendment Act (1971) and the Public Order (Amendment) Acts 1970, 1971 to the already comprehensive and draconian Civil Authorities (Special Powers) Act, first enacted in 1922, and made permanent in 1933. More recent examples under the British administration might include the original Prevention of Terrorism Act which was passed very quickly after the infamous Birmingham Bombs, and the radical diminution of the right to silence in the Criminal Evidence (N.I.) Order 1988, after a series of bombings in the summer of that year.

45 R.J. Spjut, "The Official Use of Deadly Force", *Public Law* (1986), 38.

46 S. Greer, "Internment with a Judges Stamp", *Fortnight* No. 203, 1984.

47 See, John Stalker, *Stalker* (London: Penguin, 1988), K. Asmal (Chairperson) *Shoot to Kill ? International Lawyers Inquiry* (1985).

In the context of Northern Ireland, there is perhaps no clearer example of this interplay of ideology, violence and criminality than the Hunger Strike of 1981. Prior to the Gardiner Report which introduced the process of 'criminalisation' in 1975, those who were detained without trial were considered to have "special category status". The mode of arrest, interrogation, and imprisonment were an implicit acknowledgement of their political status and therefore a candid, if reluctant, admission that law was being used as a mode of repression. In an attempt to garner world favour⁴⁸ and to undermine support in nationalist communities for Republicans, it was decided that it would be better to characterize those who resisted the authority of the British state as "terrorists" and "criminals" rather than political prisoners:

Each and every prisoner has been tried under the judicial system established in Northern Ireland by Parliament. Those found guilty, after the due process of law, if they are sent to prison by the courts, serve their sentence for what they are — convicted criminals.

They are not political prisoners: more than 80 have been convicted of murder or attempted murder and more than 80 of explosive offences. They are members of organizations responsible for the deaths of hundreds of innocent people, the maiming of thousands more and the torture, by knee-capping, of more than 600 of their own people . . . No one who is convicted of a crime carried out after 1 March 1976 — and that includes those involved in the 'dirty' protest — will be given any form of special status.⁴⁹

As a result, the Long Kesh concentration camp was rebuilt in H-Block formations, and rechristened Her Majesty's Prison, The Maze; those processed through the Diplock court system were encoded as "criminals" rather than "special category status" political prisoners. When incarcerated, they were treated as "convicts", that is, they had to wear uniforms, engage in prison work, and surrender the right of free association. The aim, in sum, was to reconstitute the problem of Northern Ireland as merely one of law and order. The prisoners refused to wear what they themselves called "the badge of criminality" (uniforms). Through the late 1970's, they went on the blanket protest, followed by the dirty protest and eventually, under the leadership of

48 See, for example, W.R. Van Straubanzee, "International Law and International Terrorism", in J. Shaw et al., *Ten Years of Terrorism* (New York: Crane Russak, 1979), 153 at 157.

49 Statement from the Northern Ireland Office, August 1978.

Bobby Sands, the hunger strike.

The hunger strike is, in many ways, the apotheosis of the nexus between the ideology of law and the violence of law. At stake was the desire of the British government to finally crush all Republican demands to legitimacy by socially constructing them as criminals, even though they had been subject to specialized legal processes. As the government argued in a release entitled *Protecting Human Rights in Northern Ireland* (1979):

All NI courts and the NI judiciary are completely independent of Government control ... and they are an integral part of the legal system in the UK. The courts play a fundamental role in the protection of human rights in NI ... No-one is imprisoned for his political beliefs, and there are no political prisoners in NI.⁵⁰

For the republican prisoners, Long Kesh/The Maze was the epitome of the violence of the British state: a metaphor for Anglo-Irish relations. The hunger strikers, in support of their "five demands" for special category status, reconstituted their bodies as a terrain of political struggle. Resistance was an attempt to re-assert agency and to seek out the lacuna in what, otherwise, would appear to be an almost total system of endocolonial repression: surveillance, arrest, interrogation, prosecution, conviction and incarceration. As Allen Feldman posits in his superb study, "in Northern Ireland, the practice of political violence entails the production, exchange and ideological consumption of bodies."⁵¹ The re-encoding of the body not as a criminal but as a terrain of struggle in the pursuit of freedom was considered to be the ultimate transgression of the *cordon sanitaire* of the H. Blocks.

But although the hunger strike and the war of positions it engendered were profoundly political, at another level, they were deeply legal. Hunger striking was not a recent phenomenon in Ireland. On the contrary, its roots can be traced back to an ancient, Pre-Christian Irish legal code, the Brehon Laws, and the practice of *cealachan* or *troscead*. *Cealachan/troscead* is a component of the ancient Irish Law of *Athgabhail* (Distress) which, in common law terms, could be considered a remedy for the commission of a tort.⁵² Stated simply, if a per-

50 Cited in Tomlinson, *supra* n.18, at 194.

51 Feldman, *supra* n.13, at 9.

52 See generally, L. Ginnell, *The Brehon Laws* (London: T.F. Unwin, 1894), 161-164; Sophie Bryant, *Liberty, Order and Law under Native Irish Rule* (New York: Encyclopedia Press, 1923), 259-287.

son had been wronged by another who was more powerful, the wronged party was entitled to claim distress by fasting at the door of the wrongdoer, once all other remedies had been exhausted. Responsibility for ending the fast vested in the perceived wrongdoer. If the latter allowed the plaintiff to starve to death, then the wrongdoer was held responsible for the death and had to compensate the victim's family. In 1981 the strikers rediscovered and reconstituted this almost silenced countervailing legal regime. The hunger strike, then, was not simply a last ditch desperate propaganda stunt. Rather it was the espousal of cultural difference, the exposition of a jural other and the assertion of a legal right.

After ten deaths inside the H-Blocks, extensive rioting and many deaths outside, the strike was effectively broken by the mothers of a later batch of hunger strikers. But it is crucial to note that the British government objected not so much to the practices of the prisoners within the prison but to their ideological status. For not only had the government been covertly negotiating with the Republican leadership throughout the strike via an intermediary called "Mountain Climber"⁵³, but also, as soon as the strike was over, most of the five demands were granted.⁵⁴ The Rule of Law had prevailed, the identity of the prisoners as "criminals" had been constituted, and the violence of the state had been legitimated. Now that the juridical ritual had been consummated by death, certain "privileges" could be granted. The double standard is made obvious by the fact that several years later the British Government after losing a case on the Prevention of Terrorism Act before the European Court of Human Rights⁵⁵ derogated from the European Convention on Human Rights, on the basis of Article 15, accepting the existence of "a war or public emergency threatening the life of the nation."

My more general point, then, is that like Christ, the violence of

53 See, for example, D. Beresford, *Ten Men Dead* (New York: Atlantic Monthly Press, 1989), 249-251.

54 *Ibid* at 332.

55 *Brogan and Others v. U.K.* [1989] 11 E.H.R.R. 117.

law is always with us.⁵⁶ At best, it is "permanent exceptionalism."⁵⁷ Violence and threats of violence are perceived as legitimate because the ideological function of law is operating simultaneously. "Repression never comes unpacked".⁵⁸ Legal violence is perceived as the appropriate dispute resolution mechanism, necessary for the preservation of "our shared experience of democracy", essential if we are to preserve law and order, particularly the latter! The zero-sum, hydraulic piston image does not adequately catch this reality; the temporal approach cannot be sufficient as a critical theory because it fails to understand adequately the relation between the ideological and violent aspects of law. From the point of view of the victims of legal violence, any theoretical distinction between the authoritarian and the normal state is irrelevant; from the bottom, violence is violence. As Jeff Sluka in his anthropological study of opinions in a Catholic ghetto points out, there is a widely accepted aphorism: "when those who make the law break the law, in the name of the law, then there is no law."⁵⁹

Legal violence, with its aura of legitimacy, is therefore continually present; it is a foundation upon which social relations are maintained in a society like Northern Ireland. As Poulantzas suggests,

State monopolized physical violence permanently underlies the techniques of power and mechanisms of consent; it is inscribed in the web of disciplinary and ideological devices; and even when not directly exer-

56 Consider, for example, the centuries of precedents for contemporary repressive laws. See Hadden et al., *supra* n.19, at 13-18; Hogan and Walker, *supra* n.42; Greer, *supra* n.14, at 54. Note also the parallels between the shoot to kill policy and the activities of the Black and Tans.

57 Consider, in the light of this proposition, the fact that although the Northern Ireland Emergency Provisions Act was introduced in 1975 as a temporary measure it has stayed in place with routinized renewal debates for 17 years, and well over 10,000 people have been convicted under it. Also, consider the doublespeak of the Prevention of Terrorism (Temporary Provisions) Act 1974, which has been in force ever since, and which has even embarrassed the Jellicoe Inquiry into admitting that "[t]he inclusion of 'Temporary Provisions' in the title of the PTA rings increasingly hollow as the years go by and the act remains in force." Review of the Operation of the Prevent of Terrorism (Temporary Provisions) Act 1976. (Cmnd. 8803, 1983).

58 R. Miller and B. Fine, eds., *Policing the Miner's Strike* (London: Lawrence and Wishart, 1984), 10.

59 J. Sluka, *supra* n.32 at 205.

cised, it shapes the materiality of the social body upon which domination is brought to bear.⁶⁰

Ideology may be the dominant role of law, and must therefore merit great attention, but this ought not to obscure the fact that violence is essential to maintain society and to control those who challenge the social order. Through "a ritualized re-synthesis of ideological and repressive apparatuses"⁶¹ law is that moment, that specific set of social relations which has as its distinctive feature the capacity for supreme yet legitimate overt violence.

III. *Fear*

The people who make and enforce legal rules are themselves social beings. Theirs is a view from the top. They see their society threatened by disruptive elements: the poor, the lazy, the spongers,⁶² Fenians.⁶³ They perceive a cloud of chaos shadowing their lives. Their motivations do not arise solely out of a bad faith, or conscious bias, but rather out of fear. It is not a great conspiracy that leads them to resort to legal violence; rather, it is people living their lives in accordance with their ideology, their sense of reality, who see their world menaced. They will fight to preserve that world, that reality.

In Northern Ireland examples of the fear of the other as articulated through law are legion. Constitutionally, the very construction of the state itself — the legal consolidation of the boundary as between the six counties and the twenty six — was driven by the fear of being overwhelmed by Catholic hordes. Legislatively, local electoral areas were gerrymandered.⁶⁴ Nor are the judiciary immune from such phobias. Consider, for example, McGonigal L.J.'s dicta in *R. v.*

60 *State, Power and Socialism*, *supra* n.12, at 81.

61 Feldman, *supra* n.13, at 235.

62 Walsh *supra* n.34, at 59-60, estimates, for example, that 40% of the offences tried in Diplock courts in 1981 were unrelated to terrorist activities.

63 At the populist level, these fears manifested themselves in pogroms. As one government report acknowledges, "eighty three percent of the 3,570 families that were burned or intimidated out of their homes in the summer of 1969 were Catholics": "Displacement of Persons" in *Violence and Civil Disturbances in Northern Ireland in 1969* (London: HMSO, 1972), 246.

64 P. Buckland, *The Factory of Grievances* (New York: Gill and Macmillan, 1979).

McCormick⁶⁵ that the use of a moderate degree of physical ill-treatment to obtain a confession would not render the statement automatically inadmissible, or Lord Diplock's exoneration of a soldier who had killed an unarmed fleeing suspect on the basis of the danger that "if he got away, [he] was likely *sooner or later* to participate in acts of violence".⁶⁶

By suggesting that the politics of fear is an important element of modern law, and positing the possibility of a "juridical unconscious"⁶⁷, a number of new questions arise. In particular, it is suggested that traditional liberal or marxist analyses of law in so far as they focus on the rationalism or utilitarianism of the legal system are, perhaps, confronting the most superficial aspects of law. To understand the fear that motivates so much of legal praxis, we must go beyond conspiratorial or rationalistic analyses⁶⁸ to uncover the deep motivational, usually unconscious, structures that underpin the legal system. Moreover, although this can be attempted through individual analyses of particular groups, for example the police or judiciary, the problems are much more systemic: it may be that the legal order is foundationally neurotic, and that the quest for rationalistic explanations is, in part, misguided.

The hunger strike, in particular, demonstrates the poverty of rationalistic analyses. As pointed out, a key purpose of the criminalization of "special category status" prisoners and the redefinition of the political nature of the problem as simply jural, was to undermine the legitimacy of Republicanism. However, as a matter of strategy, the attempt at criminalisation failed. Although many governments around the world supported Thatcher's intransigence, the media and the people in many countries were very sympathetic to the hunger strikers, and as a result the I.R.A. won an international propaganda

65 (1977) N.I. 105.

66 *The Attorney General for Northern Ireland's Reference* (No. 1 of 1975) [1977] A.C. 105 at 135 (emphasis added).

67 This idea is derived, to some extent, from Fredric Jameson's *The Political Unconscious* (Ithaca N.Y.: Cornell University Press, 1981).

68 Hadden, Boyle and Campbell seem to buy into such rationalistic analysis when they proclaim "The *natural* reaction of governments throughout the world when faced with disorders and insurrection is to introduce a battery of emergency powers", *supra* n.19, at 17 (emphasis added). There is a suggestion of utilitarianism here.

victory.⁶⁹ On the home front, the attempt at criminalization, rather than alienating the nationalist community from the Republicans, drove them into further support. During the strike, 30,000 Catholics in Fermanagh (South Tyrone) elected Sands to the British Parliament, thereby completely undermining the oft stated governmental claim that the Republicans were a tiny group of thugs who lacked any support. Moreover, the attempt after Sands' death to prevent prisoners from standing for election through the *Representation of the People Act* 1981 made things worse. Sands election agent, Owen Carron, polled even more votes. As the American commentator, Padraig O'Malley, (hardly a supporter of Republicanism) wrote

in the end, the British government's obsession with not appearing to be beaten consumed its more clever intentions. It won the contest of wills but little else. It lost the propaganda war, resuscitated an ailing IRA, and politicized militant Republicanism.⁷⁰

Moreover, if adherence to rational law was the issue, the hunger strikers had a good case for they were convicted by special courts, under emergency legislation that itself recognized the political nature of their offences. Finally, should there be any doubt as to the inadequacy of the rationalistic approach, how is one to explain Thatcher's comment to Cardinal O'Fiaich:

Will someone please tell me why they are on hunger strike. I have asked so many people. Is it to prove their virility?⁷¹

This turn to what might be called psychoanalytic jurisprudence is, in part, influenced by both feminist analyses of law and the work of J.C. Smith.⁷² Smith argues that rationalist legal and political theory are second-order "myths" that obscure and justify the collective unconscious drives that underpin society. Drawing on theories of individual development, the tension between the rationalistic *ego* and the irrational *id*, and in particular the process of separation of self and other, Smith argues that the dominant understandings of law are designed to *repress* these primordial fears. Moreover, he argues that the

69 See P. O'Malley, *Biting at the Grave* (Boston: Beacon, 1990), 3-4.

70 *Ibid.*, at 208.

71 In Beresford, *supra* n.53, at 212.

72 "Psychoanalytic Jurisprudence and Limitations of Traditional Legal Theory", in R. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1990), 223.

social order in general, of which he considers law a pre-eminent component, is in fact the product of neurosis. This he calls "Oedipus Lex".⁷³

Smith's main example, is male domination in patriarchy. Men traumatized by the separation of self from other, unconsciously fear the other [m/other, females], and repress this awareness. But in spite of this repression, indeed because of it, fear still continues to drive them. Law and legal philosophy are complicitous in this process in so far as they codify, or obfuscate, the pathological impulse that underpins law. However, the fear remains, subterranean but constitutive of the pathological legal structure. Smith argues that, by extension, these same psychological factors of fear, repression, anxiety and pathology produce social structures — law being one — which "permit or facilitate the domination of some males over other [males]". In the North American context, he refers to the racial subordination of Blacks and Natives, and the fear of the "other" that the legal regime reflects and perpetuates through its actions and institutions.

Viewed in this light, jurisprudence, and indeed the idea of the Rule of Law, fulfil "mythic justificatory function(s)". In so far as liberal legalism maintains its pretence to objectivity, abstraction and neutrality, captured in such aphorisms as "the Rule of Law, not men" it is repressing the neurosis, fear, anxiety and pathology that drive man-made law, and its proclivity for the subordination, exclusion and silencing of others — be they women, people of colour, or, as in this paper, Irish Nationalists. For Smith, we will only be able to make progress on such issues if we therapeutically recognize that law, and its neurotic underpinnings, are in fact part of the problem.

Psychoanalytic theory might shed some light on the Irish context.⁷⁴ The Northern Ireland educational system reinforces, perpetu-

73 *Ibid.*, at 225.

74 Let me offer an autobiographical anecdote that, to me at least, suggests the plausibility of at least some aspects of the psychoanalytic approach. The first time that I remember actually meeting or talking to a Protestant person was when I was in my mid-teens. Prior to that, I had lived in or on the edges of Catholic ghettos, and my only interaction with Protestants was in an adversarial context. One incident that remains particularly vivid is when I was playing street soccer with some friends when up the entry came a crowd of bare-chested, tartan clad, skin head "prods", bricks and bottles flying. As I turned around, a lad who must have been about eighteen was probably less than ten feet away. Christ

ates and escalates the separation between "self" and "other", "us" and "them". University is the first time many Northern Irish people experience an integrated education, and by then it is too late. Though there was quite a lot of socialization at University, divisive patterns prevailed. In the Law Library at Queen's University Belfast, for example, commingling was partial, and one half of the library tended to be more Catholic, whereas the other tended to be more Protestant. Moreover, I suspect that our conversations were filtered through a "hermeneutics of suspicion".⁷⁵

The point here is to suggest that given the cultural construction of my context, my comprehension of the relationship between self and other was one of alienation and hierarchy, predatory and inegalitarian. However, on entering law school, and being highly educated and inculcated in the norms of rationalism, I sought to repress these "tribal" concerns. But repression is not transcendence. The communal separation of self and other, the fetishization of sameness and the fear of difference pervaded much of my peer group, both Catholics and Protestants alike. Indeed, what surprises me is that, given the politico-historical conjuncture in which we found ourselves in the early 1980's, the tensions were not greater. Perhaps as legal acolytes we had already so bought into the ideology of the Rule of Law that we could not believe the structural reality of what was happening. After all, we had an emotional and career investment in surviving law school.

Moreover, it seems to me that at this point the student population in terms of cultural background may have been roughly equal. However, I suspect that as one goes back over the years it will become obvious that the pattern is one of increasing Catholic representation. As Hillyard points out, "in 1969, there were 61 barristers, very few of whom were Catholic. By 1984, there were over 200 barristers, a significant but unknown proportion of whom are Catholics."⁷⁶ And this would be clearly reflected both among the practising lawyers and the bench, who because of their seniority, will tend to be from the

did I run! But for a long time that was my prototypical Protestant: the other.

75 Paul Ricœur, *Freud and Philosophy* (New Haven: Yale University Press, 1970), 32-36.

76 *Supra* n.25, at 202.

Protestant culture. Consequently, these upper echelons will have even less exposure to the "other" than many of my peer group had. The neurosis may thus even be more entrenched, and perhaps for that very reason even more forcefully repressed. This may explain in part why the prosecutors of the early 1970's "may have mounted much less convincing prosecutions of Loyalist than Nationalist defendants charged with similar offences."⁷⁷

To speculate even further, it might even be worth considering that what Smith calls the "anxiety of separation" and the "anxiety of engulfment" do capture, to some degree, the collective psyche of the statelet. Republicans are traumatized by the fear of losing their identity by being separated from mother Ireland, and by being integrated with father Britain. As Gerry Adams, President of Provisional Sinn Féin, opines,

Partition and the British connection distorts our politics, sets restrictions on our economic growth, and dictates our social outlook and our cultural values.

Partition divides our people not just in the six countries but between the six countries and the twenty-six countries.⁷⁸

Unionists are the inverse. They are traumatized by the fear of losing their identity which is constructed to a large degree on their unity with Britain. They are petrified of being engulfed by a Roman Catholic Ireland. During the hunger strike, for example, Ian Paisley's *Protestant Telegraph* posited

The Church of Rome is to blame for the Hunger Strike saga. Rome has unleashed the violence on our streets once again...

... Archbishop O'Fee [sic] and Bishop Daly have been agitating for political status under the guise of Prison Reform. Their so-called persistent intent in the so-called humanitarian aspects of the H-block issue has sparked off the present terror campaign that has once again slain many and wrought untold destruction. The Church of Rome is a cruel institution prepared to spill the blood of thousands in Ulster in order to achieve power.⁷⁹

77 S. Greer and A. White, "A Return to Trial by Jury", in Jennings, *supra* n.19, at 47, 64.

78 G. Adams, *A Pathway to Peace* (Dublin: Mercier, 1988), 10.

79 Cited in P. O'Malley, *supra* n.69, at 173-174. See more generally, S. Bruce, *God Save Ulster: The Religion and Politics of Paisley* (Oxford: Clarendon,

The result of these identifications with such "macro-territorial icons" (as a "United Ireland" or a "British Ulster" is a society pervaded by

neurosis.⁸⁰

The ramifications of this sort of analysis for the Northern Ireland legal order are profoundly disturbing. The law, rather than being a cognate of reason, is a medium for the expression of "identity-in-op-position."⁸¹ It suggests that the Rule of Law instead of being the highest rational ideal, is in fact a repression of the unconscious reality and that all we have is the rule of men. And those men are driven by the trauma of fear. Perhaps this is why there is one "full-time member of the security forces for every sixty-nine people in Northern Ireland".⁸²

These conjectures should not be confined to the Irish situation. The fear of the other, the narcissism of sameness, the addictive desire to suppress those who are different may be implicated within the very ideal of the Rule of Law. If this is true, it suggests that the violence of law is the pathological product of a neurotic social order.

IV. Conclusion: Beyond the Fear and the Rule of Law

To the extent that jurisprudence has addressed the question of fear, it is usually perceived as an element of civil society and the state, and law in particular, is understood to rise above the clash of passions. The Rule of Law, however, is inherently constituted by the same processes and passions as civil society, and the pathological neurosis of fear is one. Moreover, the Rule of Law is a particularly nefarious ideology in that because of its pretensions to neutrality and objectivity, it legitimises and rationalises its pathological — even thacase of *R. v. Robinson*) to the RUC death squad for their "courage and determination in bringing the three deceased men to justice; in this case, to the final court of justice."⁸³

1986).

80 Further support for these suggestions may be culled from K. Heskin, *Northern Ireland: A Psychological Analysis* (New York: Columbia University Press, 1980).

81 O'Malley, *supra* n.69, at 259.

82 Hilliard, *supra* n.21, at 192.

83 Cited by A. Jennings in "Shoot to Kill: The Final Courts of Justice", *supra*

Yet, I do not think that all is doom and gloom, that by raising the spectre of the dark night of the unconscious, the nightmare that is Northern Ireland is irretrievably written off. Rather, I see important analogies between the therapeutic consequences of psychoanalytic jurisprudence and the critical enterprise. As Unger points out, the great thing about critique is that if you push it far enough, it will begin to identify the sources of the reconstructive agenda.⁸⁴ Recent feminist scholarship,⁸⁵ particularly in psychological⁸⁶ and moral⁸⁷ theory has argued that the significance of the separation of self and others is very different for women than for men, and that the consequent anxieties of "engulfment and separation" are less traumatic.⁸⁸ On this founda-

n.19, at 104, 116. Gibson, of course, was quite in tune with the perspective of much of the Protestant community. In a poll in May 1985, not long after Gibson made his remarks, sixty-one percent of Protestants agreed that there ought to be a shoot to kill policy. See J. Whyte, *Interpreting Northern Ireland* (Oxford: Clarendon, 1990), 87.

84 R. Unger, *Politics: A Work in Constructive Social Theory* (Cambridge: Cambridge University Press, 1987), 3 volumes.

85 R. Devlin, "Nomos and Thanatos: Part B: Feminism as Jurisgenerative Transformation, or Resistance Through Partial Incorporation", *Dallas Law Journal* 13 (1990), 123; "Towards an Anti-Racist Legal Education", *University of New Brunswick Law Journal* 38 (1989), 89; "On the Road to Radical Reform: A Critical Review of Unger's Politics", *Osgoode Hall Law Journal* 28 (1990), 641; with A. Dobrowolsky, "The Big Mac Attack: Reflections on MacKinnon", *McGill Law Journal* 36(2) (1991), 575.

86 Carol Gilligan, *In a Different Voice* (Cambridge Mass.: Harvard University Press, 1982); M. Belenky, et al., *Women's Ways of Knowing* (New York: Basic Books, 1986).

87 J. Tronto, "Beyond Gender Difference Toward a Theory of Care", *Signs* 12 (1987), 644.

88 In a very cautious and tentative aside I would also want to raise the question of the role of women as a force of societal transformation (Thatcher notwithstanding). Most of the research and scholarship on Ireland has uncritically focused on the role of men and generalized from there. While clearly women have a multitude of perspectives on the crisis of Northern Ireland, let me suggest an interpretation of one aspect of the Hunger Strike that might merit further investigation and analysis. Whereas it was the basic position of both the British Government and the prisoners that the conflict was one of principle and that any compromise would be an indication of weakness, the mothers and sisters of some of those who were among the later batch of strikers were much more contextual in their approach. Although these women supported the five

tion, several feminists have begun to cautiously articulate a post patriarchal vision of social relations based upon what some have called an "ethic of care". The "ethic of care" strives to solve problems without recourse to violence and aspires to "a more generative view of human life"⁸⁹ and, I would add, law.

Nor are feminist analyses alone in their tentative suggestions for juridical reconstruction. The critical theorist, Walter Benjamin, for example, thinks that nonviolent resolution of conflict is possible.

Without doubt ... nonviolent agreement is possible wherever a civilized outlook allows the use of unalloyed means of agreement. Legal and illegal means of every kind that are all the same violent may be confronted with nonviolent ones as unalloyed means. Courtesy, sympathy, peaceableness, trust, and whatever else might here be mentioned, are their subjective preconditions.⁹⁰

And Roberto Mangabeira Unger has advocated the idea of "solidarity rights" that recognize our vulnerability and attempt to "give legal form to social relations of reliance and trust."⁹¹

What ties each of these three perspectives together are their tentative suggestions: that the antimony of self and others is overstated; that in spite of ourselves and the cultural constructions of our identities, we are mutually interdependent and therefore mutually vulnerable; and, that greater emphasis needs to be placed on the potential of mutual trust and responsibility. Each of these elements might have a juridical relevance to the concerns raised by this paper. First, that while there is no doubt that fear of the other is deeply implanted within the communities of Northern Ireland, in many ways there is much in common; that the differences are relational rather than fixed,

demands and objected to the occupation of Ireland, they also valorized their relational "other", their sons, their brothers. In effect, it was they who brought the strike to an end, thereby preventing further deaths, and enabling the government to "grant" most of the demands, short of renewing special category status. The prisoners on the other hand, among other things, did not have to succumb to the "badge of criminality" (uniforms). The achievement of these women, it might be suggested, was a mediation of the conflict, that managed to avoid the reduction of juridical relations to death.

89 Gilligan, *supra* n.86, at 174.

90 *Supra* n.43, at 289.

91 R. Unger, *False Necessity* (Cambridge: Cambridge University Press, 1987), 535.

and therefore mutable.⁹² Second, it can be argued that those who are the primary legal actors have to recognize the legitimacy of "otherness", and develop mechanisms that facilitate the discursive articulation of that otherness, so as to allow for the gradual growth of relations of trust. And third, if it is suggested that trust and mutuality are dependent upon the actors taking responsibility for the other, as well as responsibly for their own activities.

In conclusion, I want briefly to suggest some of the juridical dimensions of responsibility that might be requested of the various constituencies who have an influence on Northern Ireland, responsibilities that might lay the foundation for the creation of a countervailing legal structure that is not overdetermined by violence. First, the Republican community must acknowledge that its campaign of counterviolence against the Northern Irish state, and the British government, confirms Unionist fears of the genocidal aspirations of the nationalist community. Rather, the Republican community should emphasize the fact that, after the secession of the twenty-six counties, the "other" Protestants in the Republic of Ireland have done quite well.⁹³ Second, the Catholic Church should dramatically curtail its own hegemonic aspirations, for example, by acknowledging the legitimacy of mixed marriages and intercommunal education, thereby abandoning stances that reinforce the traditional Unionist siege mentality. Third, the Government of the Republic of Ireland should purge its constitution of the trappings of Catholic doctrine — particularly in relation to divorce, abortion and education — and pursue an agenda of secularization.

On the Unionist side, what is required is a frank acceptance of historical responsibility for a sectarian state, and the acceptance of affirmative action programmes in education and employment to remedy past wrongs. Moreover, it is possible that if the Catholic Church were to lose some of its power, populist Protestantism — for example in its Paisleyite form — would lose much (but clearly not all) of its support. But perhaps the most crucial fulcrum of responsibility for the horror that is Northern Ireland, lies with the British state, and what O'Malley has described as "its chronic postcolonial hubris, its

92 For a similar argument in the American context see M. Minow, *Making All the Difference* (Ithaca N.Y.: Cornell University Press, 1990).

93 See, for example, K. Bowen, *Protestants in a Catholic State: Ireland's Privileged Minority* (Kingston: Queen's University Press, 1989).

predilection for an imperial righteousness that (sees) British action as being self-evidently justified."⁹⁴ Not only must the British state and its repressive apparatuses recognize that their law is but an ideologically encoded formation of violence, they must recognize the legitimate claims of the nationalist "other", eradicate their endocolonial practices, and take proactive steps, (for example by means of economic sanctions⁹⁵) to encourage recalcitrant unionists to accept Irish reunification.

These tentative closing suggestions may appear abstract and naive. However, they have the advantage of highlighting the fact that "fear of the other" is constituted, entrenched and reinforced at every level of the matrix of social relations in Northern Ireland. Moreover, insofar as they emphasize responsibilities, they recognize that human agency is vital in spite of what would appear to be irresistible structural forces. The alternative is to acquiesce in the ideology of "a will to power" in which agency is reduced to death, and where the relation between state and citizen is that of mimetic violence.

94 *Supra* n.69, at 8.

95 B. Rowthorn and N. Wayne, *Northern Ireland: The Political Economy of Conflict* (Cambridge: Polity, 1988).

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